THE LAWS OF
BARTER AND SALE
ACCORDING TO TALMUD

BY

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To the memory of my dear grandmother

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PREFACE

The following outline dealing with Barter and Sale amongst the Hebrews was written during the spare hours of the author while a student at Johns Hopkin's University.

After numerous requests the author has finally consented to publish his elementary treatise dealing with this important subject in Jewish Law.

The author has relied upon a variety of sources which he has given, so that the reader may be able to refer without difficulty to first-hand sources of Jewish Law. And last but not least he desires to express his sincere thanks to Miss Florence Cooper for her kindness in typing this for press.

—J. J. P.

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LAWS WITH REGARD TO THE SALE OF REAL ESTATE

The Jewish Laws of buying and selling according to Talmudic sources are subdivided in the following divisions, i.e.: those laws which deal with real estate, moveable property, selling of notes, the disagreement after a bargain has been made, etc.

Although these laws as set down in post-Biblical literature, which we have at hand, have been compiled and codified many hundred years ago—in countries that are foreign to ours; among people of different customs and habits; still the subterranean current of human universal justice is so great in them that when measured with the yard measure of modern jurisdiction we find an almost universal parallelism existing between them. Let us examine some of the various sections of Jewish Law which deal with selling and buying and examine some of the conclusions of the "Sublime Doctors."

The first section of the laws concerning which I propose to discuss will be those laws which deal with real estate, i.e., קרקע or as the Talmud calls it, נכסים שיש להם אחריות (1).

The only manner in which a bill of sale of real estate can be validated according to the Rabbis is by performing the necessary ceremony in one of the following modes:

כסף (a) שטר (b) חזקה (c)	(2)	(a) money (b) contract (c) taking possession,	(2)
קנין סודר or חליפין (3)		(d) symbolical delivery (3)	

(1) Mishna Kiddushin 26a.
(2) Mishna Kiddushin 26a so also יד החזקה ch. 1 מכירה par. 4, 7, 8.
(3) Choshen Mishpot מקח וממכר ch. 190, Par 1.

Let us then examine some of the examples cited in the Talmud and its codifiers with regard to the above four conditions as a means of validating a sale and from them derive the natural laws that ordinarily follow.

(a) A field can be acquired by means of כסף (4) i.e., buying a field, the sale of which only becomes legal when the money is given as a part of the contract. One gives a certain amount of money for a certain amount of land; the means of validating the sale being a deposit of money.

EXAMPLE: If A sold B a field for two thousand dollars, and B gives A one thousand dollars, promising A the remaining thousand dollars on a certain date; A, when the time is up, must inform B of the payment which is due him even if he must go to B's house once or twice (5)

If B does not then pay A the necessary amount, A can take the field in question away from B and give him one thousand dollars' worth of property, of half of the field. But if A should not chance to call on the date when the money is due, then the balance B owes A is transferred into the form of an ordinary debt—and the field in question is fully acquired by B,—that is, B has a clear title to the land bargained for.

2. Let us now regard a final contract with regard to Real Estate which had been made by כסף (i.e., money) even though a deed and the necessary transfer of Title had been effected.

If either the seller or the buyer now breaks the agreement then according to the Talmudic

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(4) Mishna Kiddushin 26a c.
(5) Choshen Mishpot ch. 190, par. 10.

Law (6) כל המוזר בו ידו על התחתונה i.e., he who breaks the agreement is to suffer for the breach of contract. For as the Talmud tells us, if the לוקח (i.e., buyer) is the one who breaks the agreement then (7) יד מוכר העליונה i.e., the seller, is to get the benefit of the bargain. We understand by this phrase of the Talmud that if the buyer breaks the contract, A, the seller can return the deposit, or if he should not care to do this, he is at liberty to give B the buyer, the most unproductive land worth the amount deposited, and valued by the usual price at the time of the breaking of the contract.

But if the seller regrets making the sale and breaks the agreement, then (8) יד הלוקח העליונה i.e., the buyer, is to get the benefit of the bargain. By that the Talmud means, B, the buyer, can say to A, "Give me back my money which I deposited for the field." Or on the other hand, B can say to A, "I shall take land for the amount I deposited, taking from the most productive land in question and at the price not at the pesent value of the land, but at the value of the land when the sale was made."

(b) The second way in which the sale of real estate may become valid is by means of (9) שטר i.e., a note or deed must be written wherein the contracting parties draw up certain agreements. The material on which a שטר i.e., contract, may be written according to Talmudic sources is on anything one has at hand, even on a (10) חרס (i.e., earthware) or עלה (i.e., leaf). In the שטר or note or deed

(6) B. M. 77 b.
(7) ibid, so also Choshen Mishpot, ch. 190, par. 10.
(8) B. M. 77, b, so also Choshen Mishpot 190, par 10.
(9) Mishna Kiddushin 26a, so also יד החזקה chapter 1, par. 7 dealing with מכירה.
(10) Choshen Mishpot, ch. 191, par 1.

must be written (11) שדי מכורה לך i.e., "My field is sold to thee." An interesting point to be noticed with regard to this law is, that if both the buyer and seller (12) confess and state that this is the deed and if there were no witnesses still the deed is valid. By that we mean that the action of the sale is valid. Another point which one must bear in mind with regard to the necessary material for or on which the שטר (i.e., document) may be written depends a great deal on whether the שטר (i.e., document) in question is a שטר חוב (i.e., note of indebtedness) for if ft is then it is not allowed to be written on a (13) חרס (i.e., earthware). For should the surface of the חרס (i.e., earthware) be rubbed away the debt may be cancelled. But in the case with regard to שטר מכירה (i.e., bill of sale) it is different, for it is not necessary to preserve the original document.

(c) Transfer of Title.

Sale of קרקע (i.e., immovable property) is accomplished by (14) חזקה (i.e., taking possession); when one of the following acts are performed:

1. The locking of the door of a house (15)
2. The putting up a fence about the lot bought
3. By breaking that which belongs to the קרקע (i.e., immovable property) in question.

1. According to the Rambam the only way of validating a sale by means of the first subheading was that the buyer in question must, if he finds the door of the house open, which he has bought—close it, lock it, then unlock it and open it again, whereby he performed the

(11) Ibid, so also Kiddushin 26a, חלכות מכירה—יד החזקה ch. 1, par. 7.
(12) Choshen Mishpot, ch. 191, par 1.
(13) Choshen Mishpot, ch. 42.
(14) Kiddushin Mishna 26a, so also B. B. 42a.
(15) חלכות מכירה—יד החזקה ch. 1, par. 10.

necessary חזקה (i.e., taking possession) with regard to validating the sale. But the Rashbam does not regard the above act of sufficient importance to validate the sale. According to his view, in order that the validity of the act might be assured there must be what he calls מעשה בנין otherwise the sale is invalid. (16). By utilizing an example from the Talmud the second of these laws can best be illustrated. A buys a field from B, about which there is no fence (17) by virtue of the fact that A put up a fence about the land in question, the necessary performance for fulfilling the second of the above three laws has been fulfilled.

3. Let us in accordance with the other two examples cited above quote the third example by virtue of which we might better understand the third law:

A buys a field from B. Going into the field, A, to validate the sale, tears a handful of grass, or sows (18) some seeds. On the other hand, should he sleep in the field for any length of time the sale is considered valid. This illustrates the third method which validates the land by חזקה (i.e., taking possession).

(d) The fourth way by means of which the sale of קרקע (i.e., immovable property) can be accomplished is by (19) קנין סודר i.e., the לוקח (buyer) producing a handkerchief holds part of it himself, and part of which he gives to the מכיר (i.e., seller) while the following formula is recited: (20) קנה זה חלף הקרקע או מטלטלין שמכרת או שנתת לי The custom of holding the handkerchief by both parties is derived from the Biblical

(16) B. B. 53 a.
(17) B. B. 53a, so also Choshin Mishpot, ch. 192, par. 4.
(18) B. B. 53b.
(19) Choshen Mishpot, ch. 190, so also Kiddushin.
(20) Chosehn Mishpot, ch. 195, par. 1. An interesting fact to be noticed is that the Ramo on the authority of the Tur in Ch. 195 par. 1, says that the above formula is not necessary to validate the sale.

phrase, "Now this was the manner in former times in Israel concerning redeeming and concerning changing for to conform all things a man plucked off his shoe and gave it to his neighbour and this was for a testimony in Israel." (21) The above method of making a sale was prohibited on the Sabbath (22) but if the act had been already performed the authorities recognized the sale as valid.

A custom was current among the Jewish traders that instead of performing the necessary selling and buying of land by קנין סודר (i.e., the taking possession by means of handkerchief) they performed what is called תקיעת יד (23) i.e., by clasping the hand, or, as some Orientalist writes somewhere, "An Oriental handshake."

CHAPTER II

THE LAWS OF MOVABLE PROPERTY

The principles of law which we have set forth in the first chapter of this Treatise are in certain respects strongly related to those upon which we are now to enter, namely those Talmudic laws which deal with the buying and selling of מטלטלין i.e., moveable property.

The (24) Gemora commenting upon the Mishnic phrase (25) נכסים שאין להם אחריות אין נקנין אלא במשיכה "property from which debts may not eventually be collected cannot be bought except by taking possession by drawing towards oneself the object to be acquired;" truly asks from whence do we know that the sale of movable property is only valid by means of the משיכה (i.e., the possession by drawing towards oneself the

(21) Ruth 4; 7.
(22) Choshen Mishpot, ch. 195, par. 11.
(23) Choshen Mishpot, ch. 201, par. 2.
(24) Kiddushin 26a.
(25) Kiddushin Mischna 26a.

object to be acquired). The answer the Rabbis give is that this fundamental law is derived from the Biblical phrase (26) "and if thou sell aught unto thy neighbour or buyest aught of thy neighbour," whereby they have concluded that this verse must necessarily mean that when any movable property is bought or sold by anyone, the valuation of the act of buying is only valid by the changing of the object in question from the hand of the seller to the hand of the buyer.

One of the chief reasons why the Rabbis do not call a contract valid with regard to movable property as made by two parties unless the משיכה (i.e. possession) is performed has also an ethical meaning: the Gemora teaches us from the phrase (27) גזירה שמא יומר זו נשרפו חיטך בעלייה which in reality is to prevent fraudulent dealings.

In order to make the ethical aspect more apparent let me illustrate the above Talmudic phrase by an example from the Rabbis.

If A should sell B a number of bushels of wheat for which B has paid A, but B having no time to remove same, he allows the wheat in question to remain in A's barn. If a fire should occur in A's barn, A might say, "as long as the wheat is B's let him come and save it," But if the law of משיכה (i.e., possession) is in force, though B paid A for the wheat, still so long as the משיכה (i.e.,possession) has not as yet been performed, the wheat in question is A's which he must guard till B comes and removes the same from his barn.

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(26) Lev. 25; 14.
(27) B. M. 47b.

CHAPTER III.

THE ETHICAL LAW OF מי שפרע

In contradistinction to the legal aspect of the Jewish law which we have discussed in the last two chapters, there are also found ethical aspects with regard to purchases; the most important one of which is the מי שפרע "he who punishes."

A sale is not valid according to Jewish law unless the entire prescription has been fulfilled with regard to validating the purchase. But if a purchase has been made between A and B with regard to some object of desire; but owing to the common agreement A did not perform the משיכה (i.e., possession) which is necessary to fulfill the entire prescription, then if on the following day either A or B wanted to break the agreement or contract made, either one can do so, but before he is to receive the money both the buyer and seller must go to a Rabbi to whom they tell of the agreement as well as of the disagreement. The Rabbi after listening to both parties recites the following formula: (28) מי שפרע מאנשי דור המבול ומאנשי דור הפלגה ומאנשי סדום ועמורה וממצרים שטבעו בים הוא יפרע ממי שאינו עומד בדברו.

"He who punished the men of the generation of the flood; and the generation who witnessed the separation of races, and the generation of Sodom and Gomorrah and drowned the Egyptians in the sea will punish him who does not stand by his word." (although the court cannot compel him). After the recital of the מי שפרע by the Rabbi the money is returned to the one who breaks

(28) B. M. Mishna 44a, so also Choshen Mishpot, par. 1, 4, section 204.

the contract. The above description of the breaking of the agreement and getting of the money culminating in the recital of the formula above quoted is known as the Ethical Law מי שפרע

CHAPTER IV.

A BILL OF SALE IS NOT VALID BY MEANS OF VERBAL AGREEMENT

With the above cited ethical law in mind let us now regard the contracting of objects by verbal agreement.

The Jewish law under ordinary circumstances does not recognize verbal contracts (29); though the agreement might have been witnessed by fifty people—unless the necessary formula, with regard to כסף (i.e., money) or שטר (i.e., document) or חזקה (i.e., possession) had been performed with regard to real estate; משיכה with regard to movable property; or הגבהה i.e., lifting; with regard to objects that are to be lifted. But if two people make a verbal agreement which by law is not actually valid and if one of the contracting parties should on the next day break the contract the other of the contracting parties cannot bring the party who broke the agreement before a Rabbi and get the Rabbi to pronounce the מי שפרע upon him.

But the man who breaks the agreement is not regarded as an honorable man, for as the Talmud tells us (30) יש בהם משום מחוסרי אמונה the way of those lacking honesty or people who have unfair dealings. While Maimonides says with regard to such an agreement (31) אין ריח חכמים נוחה אימנו i.e., though the

(29) יד ההזקה ch. 7, par. 2, הלכות מכירה
יד ההזקה ch. 1, par. 1, הלכות מכירה also Choshen Mishpot., sect. 189, par. 1, also B. M. 49a.
(30) B. M. 49a.
(31) יד ההזקה ch. 7, par. 8, also Choshen Mishpot ch. 204. par. 7 c.f. of Tur. ad. loc.

Rabbis do not regard the contract made as valid—still by breaking of the agreement made they are dissatisfied with the action of such a one.

CHAPTER V.

SALE OF A NOTE

In order for one to sell a note to another there must necessarily be, according to the Rabbinical law, what the Rabbis call כתיבה (32) consignment and מסירה handing over or delivery.

In order to arrive at a clearer meaning of the above two Talmudic phrases, let us briefly discuss them.

If A is to sell a note (33) to B which he has with regard to C; A must make a bill of sale with B, in which A must write as follows: (34) אני פב'ב מקנה לך פב'ב שטר זה על פב'ב הוא וכל שעבודא דביה

The above formula may be written on the back of the שטר חוב (i.e., note of indebtedness) or if B should want it, A would have to write him the bill of sale including the above formula on another piece of paper. After the כתיבה or the above act has been performed, then the delivery of the note i.e., מסירה from the seller to the buyer must follow.

If only the מסירה has been made or only the מסירה had been performed the sale is of no more apparent use than as the Talmud expresses it, (35) לצור על פי צלוחית (i.e., its worth is only to tie around a flask.

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(32) B. B. 77 a and b.
(33) This note is called by the Talmud אותיות in B.B. 76a and b, reason being because there are only signs and letters on the note.
(34) B. B. 76 a and b, 77 a, also Choshen Mishpot, ch. 66, par. 1.
(35) B. B. 76b.